Lastly, it was contended that on the basis of 100 per cent liability, the award of $5,000 as general damages was manifestly inadequate. For the same reason, counsel for the plaintiff submitted that the learned judge was wrong not to allow a claim of $3,705 for loss of earnings, as an item of special damages.

I would deal with this item of special damages of $3,705 first. There is no dispute as to the amount and the question is one of law. It was common ground that from October 6, 1970 till July 20, 1971, the employers, Borneo Biscuit Factory Sdn. Bhd. paid to the plaintiff through his wife the total sum of $3,705. The plaintiff contended that this was an advance and he was supported in this by the secretary of the employers. There was in fact a letter written by the secretary on February 1, 1972 stating that this $3,705 was to be treated as an advance and requesting for a settlement of this (see Ex. P10). There was no evidence to contradict the testimony of the secretary but the learned judge took the view that since the employers took no further step to recover this sum from the plaintiff, the letter was possibly written for the purpose of enabling the plaintiff to recover a bigger award of damages from the defendants. In the absence of bad faith, and the learned judge made no specific finding on this point, in my opinion, the learned judge was wrong to make such an adverse inference which was not justified by the facts. It follows that the sum of $3,705 should form part of the award on special damages. The total amount of special damages awarded should therefore be $6,848. However, following the principle enunciated in *Dennis* v. *London Passenger Transport Board*,[12] it is ordered that $3,705 which was paid by the employers to the plaintiff as advances through his wife shall be paid back to the employers out of the sums recovered from the defendants.

As regards general damages, counsel for the plaintiff submitted that a sum in the region of $10,000 should have been awarded. Now, where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide was given by Greer L.J. in *Flint* v. *Lovell*.[13] In effect, the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency (see Lord Wright's judgment in *Davies* v. *Powell Duffyrn Associated Collieries Ltd.*[14] at pages 616-617).

Counsel has not been able to show that the learned judge had erred in principle. However, as the sum of $5,000 is within the figure commonly awarded to similar injuries of the lower limb of the leg, I would not disturb this award.

In the result, the judgment of the learned judge is varied as follows:

(a) as regards liability, the judgment is that the 2nd defendant was solely to blame for the accident;

(b) with regard to agency, the judgment is that the 2nd defendant is to be held to be driving the motor-car No. KA222, at the time of accident, as an agent of the 1st defendant;

(c) as regards special damages, the total sum is increased to $6,848 and it is ordered that a sum of $3,705 shall be paid by the plaintiff to his employers, Borneo Biscuit Factory Sdn. Bhd., Kuching, Sarawak, out of the $6,848 recovered from the 1st and 2nd defendants.

To that extent, the appeal is allowed with costs here and below. Costs to be taxed.

Lee Hun Hoe C.J. (Borneo) concurred.

Order accordingly.

Solicitors: *Ee & Lim; Battenberg & Talma.*

SIVAPERUMAL PILLAI v. ABDUL SHUKOR BIN MOHAMED NOH & ORS.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) June 21 and September 5, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 171 of 1976]

Bankruptcy — Sale of lands belonging to bankrupt by official assignee — Action for declaration that sale was null and void — Not brought within one year of the sale — Limitation — Bankruptcy Act, 1967, ss. 24(4), 60, 74 and 85(4).

Limitation — Government Proceedings Ordinance 1956 s. 38 — Bankruptcy Act, 1967, s. 74.

In this case the appellant had become a bankrupt and during his bankruptcy three pieces of land were sold by the Official Assignee to the first two respondents. The appellant sued the first two respondents, the Official Assignee and the Government of Malaysia for a declaration that the sales were null and void. The action was brought after the lapse of one year from the sale. The action was struck out as the learned trial judge held it was time-barred under section 74 of the Bankruptcy Act, 1967. The appellant appealed.

Held: dismissing the appeal, the learned trial judge was correct in holding that the action was time-barred.

Cases referred to:-

(1) *Bradford Corporation* v. *Myers* [1916] 1 A.C. 242.

(2) *Government of Malaysia* v. *Lee Hock Ning* [1973] 2 M.L.J. 51.

(3) *Official Assignee* v. *Lian Hong & Ors.* [1964] M.L.J. 422.

(4) *Re Chew Kean Kor* [1957] M.L.J. 34.

(5) *Gibbs* v. *Guild* (1882) 9 Q.B.D. 59, 64.

The following cases were also cited in argument: *Midlands Rly. Co.* v. *Withington Local Board* (1883) 11 Q.B.D. 788; *Firestone Tire & Rubber Co. Ltd.* v. *Singapore Harbour Board* [1952] M.L.J. 145, P.C.; *In re a Debtor* [1949] Ch. 236.

FEDERAL COURT.

V. Balendran for the appellant.

George Chow for 1st and 2nd respondents.

Fong Seng Yee, Senior Federal Counsel (*Mokhtar Sidin*, Federal Counsel with him) for the 3rd and 4th respondents.

Suffian L.P. (read by Lee Hun Hoe C.J. (Borneo)): The plaintiff became a bankrupt and during his bankruptcy three pieces of land belonging to him were sold by the Official Assignee ("O.A.") to the first two defendants. The plaintiff sued the first two defendants, the O.A. as third defendant and the Malaysian Government as the fourth defendant for a declaration that the sales were null and void on various grounds.

On the application of the O.A. and the Government, the claim was struck out because it was time-barred. The plaintiff appeals to us.

I do not think there is any merit in this appeal.

By virtue of section 38 of the Government Proceedings Ordinance No. 58 of 1956 which provides —

"38. Any written law relating to the limitation of time for bringing proceedings against public authorities may be relied upon by the Government as a defence in any civil proceedings against the Government,"

section 74 of the Bankruptcy Act, 1967, applies. That section provides —

"74. (1) Save as provided by this section no action or process shall be maintained or served on the Official Assignee... in respect of anything done... under the provisions of this Act until the expiry of one month after notice in writing has been served on the Official Assignee... clearly stating the cause of action and the name and address of the intended plaintiff and on the trial of any such action the plaintiff shall not be permitted to give evidence of any cause of action not stated in such notice and unless the service of such notice is proved the court shall find for the defendant.

(2) Every such action shall be commenced within one year of the accruing of the cause of action and not afterwards.

(3) ...."

Here it is plain that what was done by the O.A. in selling the lands was done under the provisions of the Bankruptcy Act, for —

(1) under section 24(4) of the Act when the plaintiff was adjudged a bankrupt his property became divisible among his creditors and vested in the O.A.;

(2) under section 60 the O.A. had power to sell and transfer the lands to anybody; and

(3) under section 85(4) the O.A. had power to use his own discretion in the administration of the plaintiff's property.

As the O.A. sold the lands under the provisions of the Bankruptcy Act, if the plaintiff wished to attack their validity he had to comply with section 74. That section envisages two steps:

(a) the plaintiff must give notice under subsection (1); and

(b) he must commence action within one year of the accruing of the cause of action and not afterwards.

As regards step (a), the plaintiff gave notice all right — he did so on August 13, 1975. As regards step (b), he filed this action on the 19th of the following month. And he maintained he acted within time, since, he argued, he commenced action within one year of the notice. With respect I do not agree with him and on the contrary I agree with the learned trial judge: step (b) must be taken within one year of the accruing of the cause of the action.

Here the lands were sold on May 14, 1969, and the plaintiff must have known about the sales on December 27, 1969, when the O.A. reported to the court under section 33(3) or on August 24, 1970, when the plaintiff after discharge first retained solicitors. His cause of action must have accrued on either of these dates, and clearly his suit filed five years later was time-barred.

He alleged that he had given the O.A. notice of his intention to apply for a discharge, but that was done *after* the sales. He further complained that his lands were sold by the O.A. without his knowledge or consent, but neither was necessary under the Act.

I would therefore dismiss this appeal with costs.

Wan Suleiman F.J.: The plaintiff/appellant was adjudged a bankrupt on February 25, 1965. His only assets were three pieces of land, which were accordingly transferred under section 24 of the Bankruptcy Act, 1967 to the Official Assignee on March 6, 1967.

According to paragraphs 6, 7, 8 and 9 of the Statement of Claim which are admitted by 3rd respondent, appellant gave notice that he intended to apply for an order of discharge in July 1969. On August 16, 1969 appellant wrote to 3rd respondent notifying him that he had no creditors and requesting discharge since the previous creditor who had obtained the adjudicating order was withdrawing his claim against appellant.

Appellant then made a formal application for discharge to the High Court on September 23, 1969 and obtained an order of discharge on June 4, 1970.

On August 24, 1970 he wrote through his then solicitors to obtain return of the title deeds but was told by 3rd respondent that all three lots had already been sold by him in his official capacity. In paragraph 10 of his Statement of Claim appellant asserted that he had asked for and obtained particulars of sale from 3rd respondent who said in reply (dated September 5, 1970) that all 3 pieces had been sold in November 1969, by which date he already had notice of appellant's intention to apply for discharge.

3rd and 4th respondents — their defences are identical — say that the sale had been completed on May 14, 1969 (letter at page 95 of the appeal record) and not in November that year. Counsel for appellant submits that the Collector, as evidenced by letter at pages 93/94 was merely inviting purchasers. I am inclined to disagree with him. That letter clearly says that the persons whose names are listed had made the "offers" mentioned, at the rate of so much per acre.

Appellant concedes that a bankrupt's assets are vested in the Official Assignee, and that the latter was free to sell them by private treaty or auction but that

he could not dispose them without reference to the bankrupt or his solicitor and that the sales were not *bona fide*.

Respondent 3 and respondent 4 in their Statement of Defence maintain that the sale of the land was completed on the date respondent 3 accepted the highest offer i.e. May 14, 1969 and not in November 1969. They also contend that the action brought by appellant against them was time-barred (i) because of failure on the part of appellant to serve notice on the Official Assignee as required under section 74(1) of the Act; (ii) because of failure on the part of appellant to commence the action within one year from the time the alleged cause of action accrued as required by section 74(2).

The learned trial judge allowed an application by 3rd respondent to have the proceedings struck out, on the ground that the action was time-barred under section 74(2) of the Act, and for the same reason dismissed the action against 1st and 2nd respondents.

This is an appeal against that decision.

Mr. Balendran for the appellant contends that section 74 of the Bankruptcy Act does not apply in this particular case. He says that it contains a more restrictive provision than the Limitation Ordinance, and if there is any doubt, as there is in this instance, then this court should hold that it does not apply. He says that section 74 of the Act is similar to section 2 of the Public Authorities Protection Ordinance, 1948. Acts which are protected must be *intra vires*. *Ultra vires* acts are not protected and he claims that respondent 3's acts were *ultra vires*. He cites as authority *Bradford Corporation* v. *Myers*[1] and *Government of Malaysia* v. *Lee Hock Ning*.[2] I need only refer to the first of these.

In that case, the defendants, a municipal corporation, were authorised by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district, and they were also empowered to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months afterwards the plaintiff commenced an action of negligence against the defendants. The defendants pleaded section 1 of the Public Authorities Protection Act, 1893, as a bar to the action. It was held that the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act, 1893, afforded no defence to the action.

It should be noted that the wording of section 1 of the English Public Authorities Protection Act is for all practical purposes identical with section 2 of our Public Authorities Protection Act.

Mr. Fong maintains that respondent 3's acts were not *ultra vires*, but even if they were *ultra vires*, section 74 of the Act would still apply. I do not with respect agree with the latter part of this submission. It is not disputed that the old section 74 (prior to its amendment by Act 364 w.e.f. October 29, 1976) is applicable to this case. Section 74(1) gives protection to the Official Assignee for "anything done, intended or omitted to be done under the provisions of this Act". However there can be no doubt that if the Official Assignee had fraudulently sold the land after having had prior notice that appellant's sole creditor had withdrawn his claim against appellant who was about to obtain a discharge, he would most certainly not be doing (or omitting to do) something under the provisions of the Act, so that the notice under subsection (1) need not be given, nor would the shorter period of limitation under subsection (2) be applicable.

As Thompson L.P. said in *Official Assignee* v. *Lian Hong & Ors.*,[3] the presence of the words "in respect of anything done or intended or omitted to be done under the provisions of this Ordinance" in section 74 "makes it plain that actions against the official assignee should be divided into two classes, those which require notice and attract a period of limitation of one year and those which do not." As his Lordship had said earlier in the same judgment, "if it were not for these words no action of any sort could be commenced against the official assignee without giving a month's notice and so forth."

In his affidavit respondent 3 deposed that the contract of sale of all three lots was concluded on May 14, 1969, the day on which he sent the letter to the Collector accepting the highest offers made to the latter for those pieces of land, prices which were considerably higher than the valuation of these lots by the Collector. There was no express denial in appellant's affidavit in reply to the Official Assignee's affidavit, as the learned trial judge rightly noted. In any case, so far as the Official Assignee is concerned, the communication of his acceptance was complete, so that the bidders had enforceable contracts against him once that letter was put in the course of transmission to the Collector on May 14 (see section 4(1)(2)(a) Contracts Act, 1950, Act 136). Therefore the sale was not in November 1969 as alleged in paragraph 10 of the Statement of Claim. That date is only significant because that was the date on which the Official Assignee signed and forwarded the memorandum of transfer to the purchasers after receipt of the purchase money (see paragraph 18 of his affidavit).

The petitioning creditor withdrew his claim by letter dated July 9, 1969 (received by respondent 3 on July 13, 1969), and another creditor, not disclosed in appellant's statement of affairs withdrew his claim for $1,000, only on July 21, 1969.

In exercise of his discretion in the administration of the bankrupt's property the Official Assignee is not obliged to consult the bankrupt (see section 85 and *Re Chew Kean Kor*).[4]

It is therefore clear that in selling the land the Official Assignee was acting within his powers having done so well before he had become aware that appellant was about to apply for a discharge so that the special limitation period under section 74 would become applicable.

Learned counsel for the appellant did not appear to wish to pursue the other point he had raised in the court below i.e. that the cause of action accrued from the date of the notice, that is August 13, 1975 so that in filing the suit on September 19, 1975 he had commenced action well within time. Even if he had been unaware on May 14, 1969 that the contract of sale had been completed on that day, he had certainly found out by September 5, 1970 that the land had been sold, so that time would begin to run from the date the alleged fraud came to his notice (see *Gibbs* v. *Guild*[5]). Therefore, even if there had been fraud on the part of the Official Assignee the appellant would be clearly out of time.

The appeal is therefore dismissed with costs.

Lee Hun Hoe C.J. (Borneo) concurred.

Appeal dismissed.

Solicitors: *Balendran & Chong; Nik Hussain, Ibrahim, Tan & Abdullah.*

LIM HANG SEOH v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Chang Min Tat F.J.) October 1 and 4, 1977]

[Kuala Lumpur — F.C. Criminal Appeal No. 54 of 1977]

Criminal Law and Procedure — Sentence — Boy of 14 years found guilty of offences of possession of pistol and ammunition — Security offence — Mandatory sentence — Essential (Security Cases) Regulations 1975 — Internal Security Act, 1960, s. 57.

In this case the appellant, a boy of 14 years had been found guilty of the offence of possession of a pistol and ammunition and had been sentenced to death under section 57 of the Internal Security Act. He appealed to the Federal Court.

Held, dismissing the appeal: (1) the learned trial judge was right in concluding that the appellant knew that the bag found in his possession contained a pistol and ammunition;

(2) in view of the provisions of regulation 3 of the Essential (Security Cases) Regulations, 1957, there was only one sentence authorised by law for each of the offences and that is the sentence of death.

The following cases were cited in argument: *Tai Chai Keh* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 86, 88-9; *Chye Chong* v. *Public Prosecutor* [1975] 1 M.L.J. 214; *Public Prosecutor* v. *Sivasupramaniam* [1969] 2 M.L.J. 86, 88-89; *R.* v. *Chief Immigration Officer* [1976] 3 All E.R. 843, 847f.; *R.* v. *Secretary of State* [1976] 2 All E.R. 1081, 1083 *b*1.

FEDERAL COURT.

Karpal Singh (*S.T. Lee* with him) for the appellant.

Faidz bin Mohamad Darus (Deputy Public Prosecutor) for the respondent.

Suffian L.P. (delivering the judgment of the Court): We dismissed this appeal. There were two principal points involved. First, was the accused aware of the contents of the bag? The appellant handled this bag on four separate occasions not once, and we have seen the bag and other exhibits. In view of the evidence we are of the opinion that the learned trial judge was right in concluding that the appellant knew that the bag contained a pistol and ammunition. Accordingly we dismissed the appeal against the conviction.

The second question related to the sentence. We considered Mr. Karpal Singh's submission and that of Encik Faidz and the written law cited. We are of the opinion that in view of the words "the Juvenile Courts Act, 1947, shall not apply to such person" in regulation 3(3) of the Essential (Security Cases) Regulations, 1975, there is only one sentence authorised by law for each of these offences and that is the sentence of death, despite the fact that the accused was only a boy of 14. We therefore affirm the sentenced passed on him.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

PUBLIC PROSECUTOR v. TEH CHENG POH

[A.Cr.J. (Arulanandom J.) December 15, 1976]

[Penang — Miscellaneous Criminal Application No. 1 of 1976]

Internal Security — Offence — Decision to prosecute — Charge under Internal Security Act — Internal Security Act 1960, s. 57(1)(a) — Federal Constitution Art. 8(1).

Criminal Law and Procedure — Double jeopardy.

In this case the accused was charged with the offences of possession of a firearm and of ammunition punishable under section 57 of the Internal Security Act, 1960. At the trial certain preliminary objections were raised. It was argued (1) that the circumstances under which the accused was tried on the charge under the Internal Security Act have led to an infringement of Article 8(1) of the Federal Constitution which guarantees equal protection under the law; (2) that there had been no promulgation as to security areas under the Internal Security Act; (3) that this was a security matter and that the Internal Security Act was intended for combating political subversion and that security areas were intended to be limited areas in the Federation and not the whole of the Federation; (4) that as the accused had also been charged in the Magistrate's court for robbery and a preliminary inquiry was pending he could not be charged in the High Court for the offence, as this would mean he would be in jeopardy twice.

Held: (1) it is clear that when a person is charged under the Internal Security Act on a security offence there is no violation of article 8 of the Federal Constitution. It is not for the court to enquire why the Public Prosecutor had declared an offence a security offence;

(2) a person has to be convicted or acquitted before he could be said to be in double jeopardy.

Cases referred to:-

(1) *Public Prosecutor* v. *Khong Teng Khen & Anor.* [1976] 2 M.L.J. 166.

(2) *N. Madhavan* v. *Government of Malaysia* [1975] 2 M.L.J. 286.

(3) *Public Prosecutor* v. *Soon Seng Sia* (Penang — Criminal Trials Nos. 5, 6 & 7 of 1976, unreported).

(4) *Kathi Raning Rawat* v. *State of Saurashtra* A.I.R. 1952 S.C. 123.

(5) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152, 158.